PERNARA JAYA SDN BHD

v.

KEMAJUAN FLORA SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES WINDING-UP NO: MT1-28-19-2003]
2 DECEMBER 2003

COMPANY LAW: *Winding-up - Petition - Failure to pay taxed costs - Whether petitioner entitled to winding-up order - Whether taxed costs should be settled upon final disposal of another suit involving same parties - Whether company proved solvency - Whether allocatur of taxed costs a final order - Companies Act 1965, s. 218 - Rules of the High Court 1980, O. 59 r. 33*

CIVIL PROCEDURE: *Costs - Allocatur on taxed costs - Whether a final order - Whether company's failure to pay taxed costs entitled petitioner to winding-up order - Rules of the High Court 1980, O. 59 r. 33 - Companies Act 1965, s. 218*

This was a petition presented before the court to wind-up the respondent company for failure to comply with a statutory notice under s. 218 of the Companies Act 1965. The said notice was a demand for payment of taxed costs issued against the respondent out of the dismissal of the respondent's application to stay the execution of a court order granted in favour of the petitioner.

The issues were: (1) whether the taxed costs should only be settled upon final disposal of another civil suit brought by the respondent against the petitioner ('the other suit'); (2) whether the respondent had proved solvency; and (3) whether an allocatur of taxed costs was a final order.

Held:

[1] The respondent's statement of claim in the other suit against the petitioner contained no averment on the allocatur of taxed costs that was the subject matter of the instant petition. Further, the other suit was based on a cause of action which was completely distinct and separate from the allocatur of taxed costs in the instant petition. (p 679 f)

[2] The facts revealed that there was no proceeding to be disposed of save and except the separate and distinct other suit which had nothing to do with the taxed costs that formed the basis of this petition. There were also no other proceedings to be concluded as far as the taxed costs were concerned. (pp 681 h & 682 c)

[3] The adjudication of the respondent's directors and the failure to file statutory returns with the Registry of Companies since 1998 spoke volumes and would vigorously militate against the respondent. The case against the respondent was aggravated by its own admission of the taxed costs in its letter to the petitioner. (p 682 h)

[4] Order 59 r. 33 of the Rules of the High Court 1980 provides that upon the taxation of the bill, the certificate of the registrar unless set aside shall be conclusive as to the amount thereof. Further, there is high authority that an allocatur is a final judgment. (*Khoo Kay Hoe v. Chor Phaik Har and Another Appeal* (FC)). (p 683 a-b)

[Order in terms of petition granted.]

Case(s) referred to:

BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 CLJ 356 HC ***(refd)***
Chow Yong Hong v. Chow See Lim & Anor [1959] MLJ 23 ***(refd)***
Dato' Abdullah Hishan Mohd Hashim v. Sharma Kumari Shukla (No 2) [1994] 4 CLJ 184 HC ***(refd)***
Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad [1996] 3 CLJ 877 HC ***(refd)***
Dynaworth Shipping Sdn Bhd v. Ling Chung Ann [2001] 2 CLJ 628 HC ***(refd)***
Hai Yue Hin v. Public Feedmill (M) Sdn Bhd [1997] 4 CLJ 555 CA ***(refd)***
Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd [2002] 3 AMR 2647 HC ***(refd)***
Khoo Kay Hoe v. Chor Phaik Har and Another Appeal [2002] 1 CLJ 317 FC ***(foll)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd [1990] SLR 903 ***(refd)***
Paganelli Sdn Bhd v. Care-me Direct Sales Sdn Bhd [1999] 2 CLJ 669 HC ***(refd)***
Public Bank Bhd v. Muhibbah Meridian Sdn Bhd [2001] 1 CLJ 91 HC ***(refd)***
Re Wheeler [1982] 1 All ER 345 ***(refd)***
RHB Bank Bhd v. Pembinaan MCP Sdn Bhd [2003] 1 AMR 620 HC ***(refd)***
Shook Lin & Bok v. Yeo Kian Teck & Anor [1992] 2 SLR 16 ***(refd)***
Viking Consultants Pte Ltd v. Sykt Jaya Utara Construction (Kedah) Sdn Bhd [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 HC ***(refd)***
Vital Best Sdn Bhd v. City Finance Bhd [2000] 4 CLJ 898 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e)
Rules of the Supreme Court, O. 14 r. 9, O. 59 r. 33

For the petitioner - Thara Singh Sidhu; M/s Thara Singh Sidhu
For the respondent - Lim Whei Chun; M/s Lim Whei Chun

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Petition

Before me is the petition in encl. (1) presented by the petitioner seeking an order that:

1. the respondent, a company registered under the Companies Act 1965, be wound-up;
2. the official receiver be appointed as provisional liquidator;
3. costs of this petition be paid from the assets of the respondent; and
4. such other relief as the court may deem fit.

Factual Background

The parties herein do not appear to dispute the factual background leading to the presentation of the instant petition.

The unfolding of the essential factual background reveals that, *vide* court order dated 5 January 2001 ("order of 5 January 2001"), the petitioner's application to intervene in the Melaka High Court Originating Summons No. 24-90-1998 was allowed with costs to be paid by the respondent.

The respondent applied by way of summons in chambers for an order to stay the execution ("respondent's application for stay") of the order of 5 January 2001 pending the decision of the Court of Appeal in relation to the respondent's appeal against the order of 5 January 2001 ("the respondent's appeal").

The respondent's application for stay was dismissed by this court on 7 March 2001 with costs to be borne and paid by the respondent to the petitioner ("order of 7 March 2001").

On 20 June 2002, the learned deputy registrar taxed the costs at RM8,892.78 ("the taxed costs").

The petitioner served a statutory notice of demand pursuant to s. 218 of the Companies Act 1965 ("the s. 218 notice") at the respondent's place of business on 24 February 2003, and the respondent's registered address on 25 February 2003.

The respondent *vide* letter dated 15 March 2003 appeared to have admitted the taxed costs to be paid by their solicitors Bashir & Co. There was no appeal against the taxed costs, nor was there any compliance with the s. 218 notice. The respondent also did apply to set aside the taxed costs.

Objection By Respondent

The grounds of the respondent's objection to the petitioner's petition are essentially:

1. The respondent has a cross-claim in Melaka High Court Civil Suit No. 22-98-2002 against the petitioner in excess of the allocatur on taxed costs, and hence the petitioner is not the respondent's creditor, as a result of which the respondent has not neglected to pay the petitioner. In support thereof, the following cases were cited:

   (1) *Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd* [1990] SLR 903, 907 HC; and

   (2) *Viking Consultants Pte. Ltd. v. Sykt. Jaya Utara Construction (Kedah) Sdn. Bhd*. [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 HC;

2. The existence of an allocatur of taxed costs does not guarantee that payment thereon has to be made and reliance was placed on:

   (1) *Chow Yong Hong v. Chow See Lim & Anor* [1959] MLJ 23 HC;

   (2) *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd* [1997] 4 CLJ 555 CA;

   (3) *Dato' Abdullah Hishan Mohd Hashim v. Sharma Kumari Shukla (No. 2)* [1999] 4 CLJ 184 HC;

   (4) *Dynaworth Shipping Sdn Bhd v. Ling Chung Ann* [2001] 2 CLJ 628 HC; and

   (5) *Paganelli Sdn Bhd v. Care-me Direct Sales Sdn Bhd* [1999] 2 CLJ 669 HC.

3. The respondent has challenged the allocatur of taxed costs in the Court of Appeal and that challenge has yet to be determined by the said court. The following cases were cited:

   (1) *Vital Best Sdn Bhd v. City Finance Bhd* [2000] 4 CLJ 898 HC; and

   (2) *Public Bank Bhd v. Muhibbah Meridian Sdn Bhd* [2001] 1 CLJ 91.

In this connection, learned counsel submitted that I should reconsider my judgment in *RHB Bank Bhd v. Pembinaan MCP Sdn Bhd* [2003] 1 AMR 620, allegedly on grounds that I have erred therein.

Quite apart from the above, it was argued for the respondent that the petitioner's sole ground of the respondent's inability to pay the debt did not state that the respondent is in reality and actually unable to pay its debt.

It was also contended that the petitioner did not allege that all the respondent's assets were less than the debt that has to be paid by the respondent and so the petition was not based on s. 218(2)(c) but instead was founded on s. 218(2)(a). *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 was relied upon.

Another stand taken for the respondent was that the petitioner cannot adduce evidence on issues not raised in the petition, and so the presumption under s. 218(2)(a) did not arise. For that proposition, two cases were cited *viz*:

(1) *Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad* [1996] 3 CLJ 877 HC; and

(2) *Ng Tai Tuan, supra.*

Petitioner's Response

En. Thara Singh Sidhu, learned counsel for the petitioner, submitted that since the respondent did not challenge that the debt of RM8,892.78 was due and payable, and did not apply to set aside the s. 218 notice, the respondent is now estopped from finding spurious reasons. For this, support was sought in my judgment in *RHB Bank, supra*.

He added that there was no genuine dispute on the debt by the respondent, as the respondent's alter ego *viz*. its directors, one Wong Tiang and one Flora Lock (husband and wife respectively) were declared bankrupt on 2 April 2003 and 9 May 2003 respectively.

He contended that by reason of the respondent's commercial insolvency, the respondent has not shown any shred of evidence to rebut the statutory presumption of insolvency, and that the respondent's cross-claim raised in its first ground has nothing to do with the taxed costs here.

Further, he added that the respondent's failure in the past eight years to file the statutory returns with the Registry of Companies (now the Companies Commission) shows that the respondent has not proved its solvency, and that the last returns filed on 31 December 1998 showed a net loss of RM33,765.00.

In response to the second ground that the allocatur is an interlocutory order, raised for the respondent, it was submitted for the petitioner that the allocatur of taxed costs is a final order unless set aside or appealed against, and reliance was placed on O. 59 r. 33 and *Shook Lin & Bok v. Yeo Kian Teck & Anor*

[1992] 2 SLR 16 HC Singapore; *Khoo Kay Hoe (trustee to the estate of Oh Kee Lee @ Oh Phaik Sim, deceased) v. Chor Phaik Har and another appeal* [2002] 1 CLJ 317.

In relation to the respondent's third ground that there was an appeal against the allocatur, it was contended for the petitioner that the allocatur is conclusive and that the burden is on the respondent to prove its solvency, on the basis of *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 356.

Decision Of The Court

Question For Determination

Upon a careful consideration of the respective submissions, I am of the view that the sole question for determination herein may be stated as follows:

> Where an allocatur of taxed costs had been issued against a company such as the respondent, and the respondent has neither appealed nor set it aside, and pursuant thereto a statutory notice under s. 218 of the Companies Act 1965 has been served by the petitioner on the respondent, and the respondent has not complied therewith, is the petitioner entitled to a winding up order against the respondent?

Respondent's So-called Cross Claim

The respondent's so-called cross claim is indeed a writ action by the respondent as plaintiff in Melaka High Court Civil Suit 22-98-2002 ("the respondent's civil suit") against, *inter alia*, the petitioner for damages arising from the respondent's allegation of fraud and misrepresentation against, *inter alia*, the petitioner in a public auction on 30 October 1998 pursuant to an order for sale of this court in Originating Summons 24-90-1998.

Upon a microscopic perusal of the respondent's civil suit, it is my specific finding that the statement of claim therein contains no averment on the allocatur of taxed costs, which forms the subject matter of the instant petition. Further, that civil suit is based on a cause of action which is completely distinct and separate from the allocatur of taxed costs in the instant petition.

An analysis of the relevant cases would be useful to arrive at a conclusion on the merits of the submission for the respondent.

In *RHB Bank, supra*, a petition was presented by the petitioner, a judgment creditor (JC), pursuant to s. 218(1)(e) of the Companies Act 1965 against the respondent, judgment debtor (JD), on the basis of a summary judgment obtained by the JC against the JD. One of the grounds of objection raised for the JD was that the JD has a purported counterclaim against the JC which exceeds

the judgment sum in the summary judgment, but the JD has yet to file the counterclaim. On that issue, I held that the JD's purported counterclaim was illusory and therefore irrelevant to the petition. (See also the judgment of Jeffrey Tan J in *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd, supra*).

Even if a counterclaim had been filed as in *Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd* [2002] 3 AMR 2647, 2654, it was held by Vincent Ng Kim Khoay J to be a separate issue. (See also the cases cited in my judgment in *RHB Bank Bhd, supra,* at p. 629 lines 10 to 25).

In the Singapore case of *Ng Tai Tuan, supra*, to which I referred in my judgment in *RHB Bank Bhd, supra,* the creditor petitioned for the winding-up of the respondent pursuant to two judgments. However, the respondent's counterclaims against the petitioner were for an amount exceeding the debt owed by the respondent to the petitioner. Chao Hick Tin JC (as he then was) ordered a stay of the winding-up petition, holding that the counterclaims were *bona fide* and based on substantial grounds as various invoices were exhibited to show the materials supplied to and miscellaneous payments made on behalf of the petitioners.

It is to be observed that the stay of the winding-up petition in *Ng Tai Tuan, supra,* is an exercise of discretion based on the particular facts available in that case, in which invoices were exhibited, whereas in the respondent's so-called cross-claim in a separate civil suit, no such invoices or documents were produced to prove the damages allegedly sustained by the respondent. Further, there was no allocatur of taxed costs in that case. In view of the substantial dissimilarity of facts, I am unable to see how the respondent can reasonably draw support from *Ng Tai Tuan, supra.*

The facts in *Viking Construction, supra,* showed that in a petition by the petitioning creditor, pursuant to s. 218 of the Companies Act 1965, the respondent raised a defence of set-off and a cross-claim against the petitioning creditor for damages for breach of contract and misrepresentation, as a result of which no winding up order was made by Zakaria Yatim J (later FCJ). It is again to be noted that the s. 218 notice was not based on an allocatur of taxed costs.

Allocatur Of Taxed Costs

The second and third grounds of objection raised for the respondent may be dealt with together as they relate to one and the same issue ie, the allocatur of taxed costs.

I shall first consider the authorities on which the respondent relied.

Chow Yong Hong, supra, concerned an application by the plaintiff for an order for the postponement of the payment to the defendants of the taxed costs awarded, under O. 14 r. 9 of the then Rules of the Supreme Court as the defendant was given unconditional leave to defend, so that the suit may be finally decided. Smith J held that the proceedings were purely interlocutory and that the costs should be settled at the end of the action. Contrasting the facts there with the facts in the instant petition, wherein there is no longer any proceeding to be settled after the allocatur of taxed costs had been given and the allocatur was not for an O. 14 proceedings, I am unable to agree with the submission for the respondent that the allocatur of taxed costs was in relation to an interlocutory proceeding.

On similar facts, the Court of Appeal in *Hai Yue Hin, supra,* followed *Chow Yong Hong, supra,* as both these cases concern the taxation of costs arising from the dismissal of plaintiff's O. 14 application for summary judgment. As the main suit has yet to be disposed of, costs were ordered to be paid after the conclusion of the proceedings. The Court of Appeal also made it absolutely clear that if the judge finds sufficient evidence to justify an order of costs to be paid forthwith, he may make such an order.

In *Dato' Abdullah Hishan, supra,* the main issue was whether costs may be dealt with by the court at any stage or after the conclusion of the proceedings. RK Nathan J at p. 188d held that the bill of costs be taxed and the taxed costs be paid forthwith. This case is obviously adverse to the submission for the respondent.

One of the issues for determination in *Dynaworth Shipping, supra,* was whether taxed costs should only be settled upon final disposal of the case. The facts there revealed that one Ling Chung Aun had claimed against Dynaworth in the sessions court for RM148,580 being alleged outstanding salary. On Dynaworth's application, the sessions court struck out Ling's claim with costs. Ling's appeal to the High Court was allowed with costs which Ling proceeded with taxation and the taxed costs amounted to RM9,895.40. Dynaworth had applied to the Court of Appeal for leave to appeal against the decision of the High Court. Sulaiman Daud JC (now J) held that taxed costs in the absence of any order for it to be paid forthwith should only be paid at the end of the action, as the case still has to be reverted to the session's court for full trial and hearing.

In relation to the facts of the petition before me, there was no proceeding which has to be disposed of, save and except the separate and distinct civil suit which has nothing to do with the taxed costs as the basis of the instant petition.

In *Paganelli Sdn Bhd, supra,* the petitioner presented a petition for the winding-up of the respondent pursuant to s. 218(1)(e) of the Companies Act 1965 on the ground that the respondent was unable to pay its debt. Upon being served with the petition, the respondent filed a motion to strike it out, which the learned judge did, on the ground that the debt allegedly due to the petitioner was genuinely disputed on substantial grounds. The petitioner filed an application for leave to the Court of Appeal. Pending the hearing of its application for leave, the petitioner applied for stay of the order striking out the petition and of the taxation of costs. Clement Skinner JC (now J) held, *inter alia*, that as the petitioner was seeking leave to appeal, proceedings between the petitioner and the respondent have not concluded yet. It is pertinent to observe that in the instant petition there is no proceeding in the same action which have not been concluded as far as the taxed costs are concerned.

In *Vital Best, supra,* the plaintiff has filed an originating summons against the defendant seeking an injunction to restrain the defendant from presenting a petition for the winding-up of the respondent pursuant to a s. 218 notice. There the petitioner has obtained from the registrar a summary judgment against the respondent, but the respondent has appealed therefrom to a judge in chambers. On the issue, Ramly Ali JC (now J) held that in view of the appeal, the petition for winding-up the respondent was *mala fide* and an abuse of the process of the court and hence granted an interim injunction pending the disposal of the said appeal.

Similar facts were revealed in *Public Bank Bhd, supra*. KL Rekhraj J (as he then was) held that the summary judgment which was subject to and awaiting an appeal could not be said to be an undisputed debt, as a result of which the learned judge granted a stay of proceedings pending appeal against summary judgment.

The facts of the cases *viz. Vital Best, supra* and *Public Bank Bhd, supra,* relied upon by the respondent were vastly different from those in the instant petition. I am unable to see how they supportive of the respondent's case.

In *Maril-Rionebel, supra,* the issues did not concern any winding-up petition based on taxed costs and so is not useful to the respondent.

The adjudication of the respondent's directors Wong Tang and Flora Lock on 2 April 2003 and 9 May 2003 respectively and the failure to file statutory returns with Registry of Companies since 1998, speak volumes and would vigorously militate against the respondent. The case against the respondent is aggravated by its own admission of the taxed costs in its letter to the petitioner's solicitors.

Quite apart from the above, it is necessary to refer to O. 59 r. 33, which where relevant, reads as follows:

> Upon taxation of the bill, the certificate of the registrar, unless set aside, shall be conclusive as to the amount thereof.

There is high authority that an allocatur is a final judgment: *Khoo Kay Hoe, supra* FC, following *Re Wheeler* [1982] 1 All ER 345.

In Singapore, O. 59 r. 33 which is in *pari materia* with our O. 59 r. 33, came up for judicial consideration in *Shook Lin & Bok, supra*. Michael Hwang JC held that the certificate of the registrar upon taxation is conclusive.

At this juncture, it is necessary to narrate the indefatigable initiative and idealism of the respondent's learned counsel in imploring me to reconsider my decision in *RHB Bank, supra,* seemingly on some alleged errors. While I appreciate his phenomenal endeavour in this respect, I hasten to add that he cannot be blamed for his ignorance of the doctrine of *functus officio*. Having given a considered judgment in *RHB Bank*, I am *functus officio*. I am not likely to be the appropriate forum for him to ventilate his views as to the correctness or otherwise of my own judgment. In all humility, I must say that is easier for him to attempt to demolish than to establish a judgment, but he must and is always at liberty to do so in the proper forum, but certainly not before the very same judge who has given his thought to a speaking judgment.

Conclusion

I am unable to see any merits in the submissions presented for the respondent. In the circumstances, I make an order in terms of the petitioner's petition as enumerated at the outset of this judgment.